

City of Detroit

CITY COUNCIL

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TO: The Honorable Detroit City Council

FROM: David Whitaker
Nkrumah Johnson-Wynn
Sherée Edwards

DATE: January 23, 2006

**RE: SUMMARY OF JUDGE FEIKENS' OPINION AND ORDER
DENYING OAKLAND COUNTY'S MOTION TO REPLACE THE
DETROIT WATER AND SEWERAGE DEPARTMENT'S COURT
APPOINTED SPECIAL ADMINISTRATOR FOR LACK OF
JUSTICIABILITY**

The Research and Analysis Division (RAD) submits the following report as a summary of the above-referenced federal court Opinion and Order dated January 5, 2006¹.

A. THE POWERS OF THE SPECIAL ADMINISTRATOR

In February 2000, in the matter of *United States of America, et al v. City of Detroit and Detroit Water and Sewerage Department* (Case No. 77-71100), Judge John Feikens entered an Order Appointing Special Administrator for the Detroit Waste Water Treatment Plant of the Detroit Water and Sewerage Department (DWSD). The specific powers of the Special Administrator are articulated in Section II of the Order, which is cited below in its entirety for your review and reference:

A. Appointment of the Special Administrator

1. Dennis W. Archer, Mayor of the City of Detroit, is appointed Special Administrator of the Detroit WWTP² for the purposes of correcting the causes of non-compliance as found by the Committee and for

¹ On the date the Opinion and Order was entered, "www.crainsdetroit.com" inaccurately reported the content of the Judge Feikens' ruling. This memo serves to correct those inaccuracies.

² WWTP refers to the Waste Water Treatment Plant.

the purpose of achieving long-term, sustained compliance with the NPDES³ permit.

2. The appointment shall be for one year, or until further order of this court.

B. Requirement that the Special Administrator Procure the Services of a Chief Operations Officer

1. The Special Administrator shall forthwith procure the services of a Chief Operations Officer skilled in the management and operation of this complex treatment plant to assist him in carrying out his duties.
2. This Chief Operations Officer shall be responsible only to the Special Administrator.

C. Powers of the Special Administrator

1. The Special Administrator, or his designee, the Chief Operations Officer, **shall have full power and authority to control, manage, and operate the WWTP, including all functions and powers of the Detroit City Council, the Detroit Board of Water Commissioners, the DWSD, and any other departments, boards, or divisions of the City of Detroit** to the extent that they affect the ability of the Special Administrator to meet the requirements of sustained compliance with the NPDES permit, the Supplemental Consent Judgment to be entered in this case, or the specific responsibilities of the Special Administrator outlined below. (Emphasis added).

Judge Feikens entered a second order on February 7, 2000 entitled "Supplement to Order Appointing Special Administrator" that further describes the Special Administrator's powers as follows:

The following powers, without limitation, are included among the powers of the Special Administrator granted under paragraph II. C. 1. of the Court's Order Appointing Special Administrator:

1. The collection of receivables; the payment of its debts, and entering into and performances of all contractual

³ NPDES refers to the National Pollutant Discharge Elimination System.

obligations of the system related to the wastewater treatment plant. Such contracts shall be subject to the requirement of competitive bidding except when, in judgment of the Administrator, it is necessary to waive the same;

2. Supervision of all employees of the system, including the hiring, assignment and dismissal thereof, whether or not such employees are or may be covered by collective bargaining agreements;

3. The hiring of such special consultants, contractors, engineering firms or counsel which the Administrator deems necessary or appropriate; and

4. The borrowing of such funds and pledging of security therefore as is necessary to carry out the duties imposed upon the Special Administrator provided, however, that all powers delegated to the Special Administrator are subject to the established rights of existing bondholders as set forth in the Bond Ordinances of the City of Detroit and bonds issued pursuant thereto, which rights are explicitly recognized herein.

Following the November 2001 Mayoral election, Judge Feikens entered an "Order Continuing Special Administratorship for the Detroit Water and Sewerage Department" and appointed Mayor Kilpatrick to serve in that capacity. That Order, dated December 3, 2001⁴, provides in pertinent part as follows:

As provided for in the Second Amended Consent Judgment of August 3, 2000, the appointment of Dennis W. Archer, Mayor of the City of Detroit, as Special Administrator of the Detroit Water and Sewerage Department was for the purpose of correcting the causes of non-compliance, and for the purpose of achieving long-term, sustained compliance with the NPDES permit. This purpose is continued in the Special Administratorship with Kwame M. Kilpatrick in his capacity as Mayor and Special Administrator.

B. THE OPINION AND ORDER DENYING OAKLAND COUNTY'S MOTION TO REPLACE DWSD'S COURT APPOINTED SPECIAL ADMINISTRATOR FOR LACK OF JUSTICIABILITY

On January 5, 2006, Judge Feikens entered an Opinion and Order denying Oakland County's motion to replace the Detroit Water and Sewerage Department's Court Appointed Special Administrator with a Joint Management Committee.

⁴ The December 3, 2001 Order was scheduled to take effect on January 1, 2002 at 12:01 a.m.

A. Historical Overview

The Court, exercising its “equitable powers”, created the position of Special Administratorship when it became clear that compliance with the Consent Judgment would not be achieved “easily or quickly”. The position of Special Administrator remained in place until sometime after the Second Amended Consent Judgment was signed but was temporarily suspended. When, however, “compliance with the Clean Water Act or the Consent Judgments” was at risk, the position of Special Administratorship was revived to give the Mayor the power to “swiftly take the necessary actions to achieve compliance”.

In 1998, the State of Michigan in tandem with the Environmental Protection Agency, issued a notice of violations of DWSD’s permit to operate the sewage plant. Judge Feikens appointed a committee to investigate why the plant was not able to remain in compliance with federal and state law. In January 2000, the committee reported that many causes of non-compliance had existed for at least three years.

By Order dated December 2001, Mayor Kilpatrick was named as Special Administrator⁵. The Judge cites two key decisions⁶ that occurred during Mayor Kilpatrick’s tenure that resulted in “significant progress toward compliance with the Clean Water Act”; namely, the hiring of Victor Mercado⁷ as DWSD’s director, and the hiring of Infrastructure Management Group (IMG) to serve as a consultant to DWSD.

Judge Feikens affirmatively states that Mr. Mercado cut DWSD’s operating budget by ten (10) percent without negatively affecting compliance. Furthermore, the water rate increases during Mr. Mercado’s tenure have been relatively small, with DWSD’s rates being “among the lowest in the nation despite the cost of many required improvements”.

According to Judge Feikens, IMG assisted Mr. Mercado “and this Court by providing evaluations of DWSD’s contracts and noting opportunities for increased efficiency.” Judge Feikens states that “[t]here have been no permit violations, there has been good progress on the construction of mandatory projects, and financially DWSD is in a position to continue compliance. Under Kilpatrick’s leadership, DWSD is now making steady progress toward long-term compliance and the end of this Court’s oversight”.

⁵ In his conclusions of law, Judge Feikens states: “In an attempt to balance the need for DWSD to comply with federal law and with the Michigan Constitution’s clear statement that ownership and control of the system belongs with the City of Detroit, I chose to create the position of Special Administrator and place the Mayor of Detroit in that role. (citation omitted) The appointment of a Special Administrator is for the express power of allowing him to override the City’s charter when necessary to effectuate speedy compliance.”

⁶ Judge Feikens also notes that the Wastewater Treatment Plant has not violated its NPDES permit during Mr. Mercado’s tenure and includes a supporting correspondence as an attachment to the Opinion and Order.

⁷ The Opinion and Order states that Mayor Kilpatrick used his position as Special Administrator to extend Mr. Mercado’s contract through the end of 2006.

B. Oakland County's Motion

In addition to asking the Court to replace the Special Administrator with a Joint Management Committee, Oakland County requested relief regarding several contracts approved by Mayor Kilpatrick in his capacity as Special Administrator. According to the Opinion, Oakland County's Motion cites all of the contracts that were the subject of media reports but places particular emphasis on a contract for a "regional communications system" commonly referred to as the 800 MHZ contract⁸.

The disputed contracts are still at issue. At the Court's request, Special Master, F. Thomas Lewand, has been asked to investigate the disputed contracts and make a report and recommendation to the Court. According to the Opinion, Mr. Lewand's investigation is "nearly complete"⁹.

With regard to Oakland County's Motion to replace the Mayor with a Joint Management Committee, Judge Feikens reaches the following conclusions: "a review of the facts indicates that under Mayor Kilpatrick's Special Administratorship, DWSD's compliance has improved dramatically, such that the position of Special Administrator (which is akin to a receiver) is not necessary at this time. Therefore, because I am ending the position of Special Administrator for the present time, I DENY the motion to replace Mayor Kilpatrick as Special Administrator for mootness." Judge Feikens goes on to state as follows:

Here the facts show a rapid improvement in the operation of DWSD such that the Department is successfully completing or attempting to complete its responsibilities under the Consent Judgments, and, although more work remains, is well on its way to achieving compliance with the Clean Water Act. I find that compliance with federal law no longer regularly requires urgent action. Therefore, I TERMINATE the Special Administratorship, because it is not needed at the present time. As the termination of the Special Administratorship renders the controversy over who this Court selects to fill that role moot, I DENY the motion.

The Court left open the possibility of that the position of Special Administrator could be "revived" again in the future. Judge Feikens states that **"nothing in this Opinion and Order prevents the Mayor of Detroit from requesting that this Court**

⁸ In August 2003, City Council received notification that Mayor Kilpatrick (as Special Administrator) approved a contract with PMA Consultants to provide "Oversight Management Services with respect to the procurement and implementation of the 800 MHZ radio communications system". The radio communications system was to replace the existing one and to be utilized by the entire City. (See attached RAD report dated January 12, 2004 – Exhibit A).

⁹ For the reason that the Special Master is in the process of reviewing the disputed contracts and the look-back procedure is available as a remedy for any hardship, Judge Feikens found the remaining issues in the motion were "insufficiently ripe" and dismissed those claims for "lack of justiciability".

again exercise its own equitable powers, should an urgent situation arise that requires the override of the Cities charter to effectuate compliance with the Consent Judgment". (Emphasis added)

Judge Feikens concludes the Opinion and Order by addressing the issue of regionalization:

Now, DWSD's system, vital as it is to the health and quality of life in southeastern Michigan, has faced repeated challenges from some suburban communities who are prevented by the state's constitution from having any say in the ownership or operation of DWSD. **At the same time, the people of Detroit who provide this valuable service are barred by state law from receiving any financial benefit or profit for doing so.** This tension underlies the disputes that continue to come before this court.

This dilemma will not be resolved by legislation or litigation. It demands cooperation on the part of the southeast Michigan communities and the agreement by DWSD to modify the protection given to it by the state's Constitution as part of a regional settlement¹⁰. (Emphasis added).

A copy of the Opinion and Order is attached as Exhibit B.

Attachments

¹⁰ As a step toward regionalization, Judge Feikens clearly recognized that the State Constitution places the right to own and operate the water and sewerage system solely in the hands of the City of Detroit but stated that the City voluntarily agreed to participate in the Southeast Michigan Consortium for Water Quality. Although the effort has "made progress on key issues", Judge Feikens declined to continue to ask "talented leaders in our region to devote their energies to the Consortium unless there is optimism that this is a venue in which further progress can be made. Toward that end, the Judge requested that either Timothy O'Brien, the Consortium's working chairman, and either Charles Hersey or Paul Tait, SEMCOG's officers, report directly to him regarding their view of the progress that has been made to date and the outstanding issues to be addressed. The Opinion and Order is void of a report submission date.

EXHIBIT A

City of Detroit

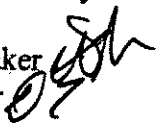

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LYNN BLUMENBERG
Deputy Director
(313) 224-4543

TO: The Honorable City Council

FROM: David Whitaker 
David Teeter 

DATE: January 12, 2004

RE: Mayor's Role as Special Administrator of the Water and Sewerage Department

The City Council received notification, during the August 2003 recess, of a contract with PMA Consultants to provide "Oversight Management Services" during the procurement and implementation of the 800 MHZ radio communications system. Contract 2615907 (Water and Sewerage Number CS-1386) was approved by the Mayor as the Special Administrator for the Water and Sewerage Department on May 29, 2003. The contract with PMA Consultants is valued at \$7,248,000 for a term through May 1, 2005.

Questions were raised by the City Council concerning the scope of this contract. PMA Consultants will assist the Department of Water and Sewerage (DWSD) to prepare the specifications and request proposals or bids to provide and implement the radio communications system. This contractor will further provide the management and oversight services on behalf of the City and DWSD to ensure the compliance with the contract specifications to provide and implement the communications system. The acquisition of the 800 MHZ radio communications system will replace the existing system for a cost exceeding \$100 Million. The practice of contracting for services to assist with the solicitation of proposals and provide oversight of contracts that are significant in scope and cost has been a common procedure in DWSD.

In addition to DWSD, it is anticipated that other City departments will also utilize and be part of this communications system. The fact that the proposed radio communications system will be a City-Wide communications system has raised additional questions about the Mayor's use of his authority as Special Administrator for the Water and Sewerage Department to authorize the Contract 2615907 with PMA Consultants. DWSD responded, in a memo dated November 14, 2003, that authorization of Contract 2615907 (CS-1386) was within the authority of the Mayor as Special Administrator. Council Member Sheila Cockrel requested the Research and Analysis Division to provide an opinion on whether the Mayor has the authority as Special Administrator to authorize actions or contracts that includes other departments of the City that are not subject to the Court Order appointing the Mayor to be Special Administrator.

The Honorable City Council
Mayor's Role as Special Administrator of the Water and Sewerage Department
January 12, 2004

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It is the opinion of the Research and Analysis Division that the Mayor's authority as Special Administrator for the Water and Sewerage Department does not enable the Mayor to bypass the City's purchasing procedures to enter into City-Wide contracts. As Special Administrator, the Mayor does have broad and comprehensive authority to ensure that DWSD complies with the requirements of the federal Clean Water Act and the National Pollutant Discharge Elimination System (NPDES) permit to enable the Wastewater Treatment Plant to discharge treated water into the Detroit River. As Special Administrator, the Federal Court specifically authorized the Mayor to bypass the City's purchasing procedures, as well as supervision of all employees, whether or not they are covered by collective bargaining agreements. The Court's Order appointing the Mayor to be Special Administrator is also limited to the Water and Sewerage Department for the specific reasons of bringing the Department into full compliance with the Clean Water Act and the NPDES permit.

The Court Order appointing the Mayor of Detroit to be Special Administrator for the Detroit Wastewater Treatment Plant (WWTP) was entered in February 2000. The appointment of Mayor Archer, at that time, to be Special Administrator was for the purpose of correcting the causes of non-compliance with the federal Clean Water Act and the 1997 National Pollutant Discharge Elimination System (NPDES) permit; and to ensure long-term sustained compliance with the permit. Section II C of the Court Order states as the "Powers of the Special Administrator:"

The Special Administrator, or his designee, the Chief Operations Officer, shall have full power and authority to control, manage, and operate the WWTP, including all functions and powers of the Detroit City Council, the Detroit Board of Water Commissioners, the DWSD, and any other departments, boards, or divisions, of the City of Detroit to the extent that they affect the ability of the Special Administrator to meet the requirements of sustained compliance with the NPDES permit, the Supplemental Consent Judgement to be entered in this case, or the specific responsibilities of the Special Administrator outlined [in the remainder of the order].

In December 2001, The Honorable John Feikens of the United States District Court, Eastern District of Michigan, Southern Division, continued the Special Administratorship for the Water and Sewerage Department, appointing Kwame Kilpatrick, as the elected Mayor to be Special Administrator of the Detroit Water and Sewerage Department, effective at 12:01 AM on January 1, 2002. The Order to continue the Special Administratorship and appoint Mayor Kilpatrick as Special Administrator is for the purpose of achieving long-term, sustained compliance with the NPDES permit.

The Honorable City Council
Mayor's Role as Special Administrator of the Water and Sewerage Department
January 12, 2004

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The Mayor, in his Order Number 2003-1 to authorize the contract with DWSD and PMA Consultants, states that upgrading and replacing the radio communication system is part of his responsibility to oversee the operation of DWSD and ensure its effective and efficient operation. The new radio system will also enhance and ensure the security of DWSD's operations. The Mayor further indicates that the 800 MHZ Communications System will be utilized by other City of Detroit Departments. The Mayor and DWSD both emphasize that the powers of the Special Administrator include "functions and powers of . . . other City of Detroit departments, boards, or divisions to the extent that they affect the ability of the Special Administrator to meet the requirements of sustained compliance with the NPDES permit . . ."

The Mayor appears to be stating that he has the authority to execute contracts binding other City departments, boards and divisions, if he believes they affect the ability of DWSD to maintain compliance with the NPDES permit. The Court Order appointing the Mayor to be Special Administrator specifically provided that processes be implemented on behalf of the Wastewater Treatment Plant to: expedite the emergency procurement of materials; update training curriculum; allow individuals outside the civil service system to compete for jobs and advancement; shorten turn-around time on hiring decisions. All of these processes affected or bypassed procedures of other City departments or agencies, allowing the Special Administrator to assume the powers and functions of the Purchasing Division, Human Relations Department or Labor Relations Division. The Court Order did not state, nor does it seem implied in the Order that the authority of the Special Administrator extends to binding other departments or divisions to contracts.

The only parties to Contract 2615907 are PMA Consultants and DWSD. It appears that DWSD is taking the lead in obtaining the new radio communications system. If this will be "unitary" communications system, as indicated by the Mayor in his order, it would have seemed prudent to have consulted with all using departments and agencies in preparing the specifications and planning for the new radio system. The Mayor states that other departments using the system will pay their proportional share of the initial cost, operations and maintenance of the project. Neither the Mayor's office nor DWSD has provided additional information to explain how other departments will participate in the new communications system. The participation of DWSD compared with the rest of the City is important to the determination that Contract 2615907 with PMA Consultants, and a future contract to acquire and implement a new communications system, is a Water and Sewerage contract with minor participation of other departments or agencies, or is in fact a City-Wide contract.

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The City Council may wish to request a discussion with DWSD, the Mayor's Office, Finance Department and other relevant using departments concerning the implementation of the new 800 MHZ Communications System, the cost, and the procedures for acquisition and implementation. Having the discussion at this time may expedite approval of the contract at a future date. The Water and Sewerage Department is also under much greater scrutiny by the metropolitan community in addition to the State Legislature. It is imperative that a major procurement by the Water and Sewerage Department is not viewed as being taken on behalf of the City. A discussion of this project will allow the Water and Sewerage Department, in addition to other City Departments to explain their participation in the Communications System project.

Attached: Order No. 2003-1 of the Special Administrator of the Detroit Water and Sewerage Department authorizing Contract CS1386 with PMA Consultants

SPECIAL ADMINISTRATOR
OF
THE DETROIT WATER AND SEWERAGE DEPARTMENT
ORDER NUMBER 2003-1

TO: Honorable City Council
 Honorable Board of Water Commissioners
 Department Heads and Deputies
 Executive Staff Boards and Commissions

SUBJECT: Award of Contract CS-1386

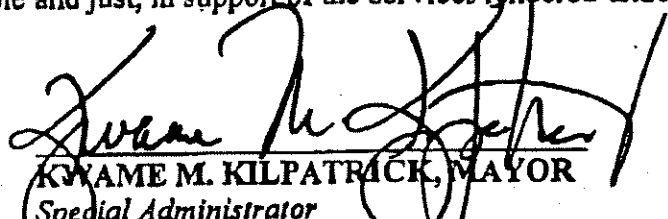
On February 7, 2000, the Federal District Court issued an Order and Supplement to Order Appointing Special Administrator for the Detroit Wastewater Treatment Plant of the Detroit Water and Sewerage Department ("DWSD") in the matter of *U.S. EPA v City of Detroit, et al*, Case No. 77-71100 ("Orders"). The Orders created the position of Special Administrator of the Detroit Wastewater Treatment Plant for the purpose of correcting the causes of noncompliance by DWSD with its NPDES permit and for the purpose of achieving long term, sustained compliance with the permit. On December 3, 2001, by Order Continuing Special Administratorship for the Detroit Water and Sewerage Department, effective at 12:01 a.m. on January 1, 2002, I was appointed Special Administrator of the Detroit Water and Sewerage Department, and the purposes of the Orders were continued. The February 7, 2000 Order provides that compliance with the NPDES permit is to be achieved and sustained by the correction of the causes identified in the Report of the Committee, by carrying out the provisions of the July 12, 1999 Plan for Compliance of the Detroit Water and Sewerage Department and by carrying out the recommendations of the Organizational and Operational Review Report of March 1995. These documents form the foundation of the responsibilities to be undertaken by me.

The Orders, as continued by the December 3, 2001 Order, further provides that as Special Administrator, I shall have full power and authority to control, manage and operate the DWSD, including all functions and powers of the Detroit City Council, the Detroit Board of Water Commissioners, the DWSD and any other departments, boards or divisions of the City of Detroit to the extent that they affect my ability to meet the requirements of sustained compliance with the NPDES permit, the Second Amended Consent Judgment ("SACJ"), and other specific responsibilities outlined in those Orders. They also provide me the power to enter into and perform all contractual obligations of the system related to the wastewater treatment plant, and to have such contractors which I deem necessary or appropriate.

In connection with the exercise of my responsibilities to oversee the operation of the DWSD and to ensure its effective and efficient operation, I have determined that it is necessary to upgrade and replace the existing radio communications system used by DWSD to dispatch, communicate with and coordinate the activities of its field operations and maintenance crews, with a new 800 MHZ radio communications system and network ("800 MHZ Communications System"). Such upgrade is also needed to enhance and ensure the security of DWSD's operations. While the 800 MHZ Communications System will also be utilized by other City of Detroit departments, those departments will pay for their proportional share of the capital, operation and maintenance costs of that project, and I have determined that a unitary communications system is the most efficient and economical means to address Detroit's communications needs.

DWSD and PMA Consultants LLC propose to enter into Contract No. CS-1386, for project oversight services for the 800 MHZ Communications System. In order to perform and fulfill my obligations as Special Administrator, I have approved and executed Contract No. CS-1386 with PMA Consultants, LLC, by and between the City of Detroit, acting by and through its Board of Water Commissioners.

I HEREBY DECLARE THAT Contract No. CS-1386 is a valid contract binding upon the parties pursuant to the powers vested in me as Special Administrator of the Detroit Water and Sewerage Department by Orders of the Federal District Court. I further authorize DWSD Director Mr. Victor Mercado to identify and retain on my behalf any other qualified consultant(s), on terms he deems reasonable and just, in support of the services rendered under Contract No. CS-1386.


KWAME M. KILPATRICK, MAYOR
Special Administrator
Detroit Water and Sewerage Department

Dated: 5/29/03

DET02164814.1
IDWMDJ

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

FILED
JAN - 5 2006

CLERK'S OFFICE
DETROIT

UNITED STATES OF AMERICA,
Plaintiff and Counter-Defendant,

vs.

Civil Action No. 77-71100
Honorable John Feikens

STATE OF MICHIGAN,

Defendant and Cross-Plaintiff
And Cross-Defendant,

vs.

RECEIVED
JAN 9 2006
CITY COUNCIL
RESEARCH AND ANALYSIS DIVISION

CITY OF DETROIT, a municipal corporation, and
DETROIT WATER AND SEWERAGE DEPARTMENT,

Defendant and Cross-Plaintiff,

vs.

ALL COMMUNITIES AND AGENCIES UNDER
CONTRACT WITH THE CITY OF DETROIT FOR
SEWAGE TREATMENT SERVICES,

et al.

**OPINION AND ORDER DENYING OAKLAND COUNTY'S MOTION TO REPLACE
DWSD'S COURT APPOINTED SPECIAL ADMINISTRATOR FOR LACK OF
JUSTICIABILITY**

On September 26, 2005, Oakland County filed its Motion to Replace the Detroit Water and Sewerage Department's (DWSD's) Court-Appointed Special Administrator, Mayor Kwame Kilpatrick, with a Joint Management Committee. I GRANT the motions by Macomb County, Oakland County, and the City of Detroit to exceed our normal page limits for briefs, responses, and replies, and I accept the City of Warren's amicus brief. No other party – of whom there are dozens – nor any other individual has submitted anything to this Court regarding this motion.

Because of the relatively small interest the vast majority of the parties appear to have in this matter, as well as the extensive briefing by the few parties that do seem concerned, an oral hearing on this motion would not be useful. Local Rule 7.1(e)(2).

Of paramount importance to my analysis of the motion, I point out that there are two cardinal laws central to the dispute between the Detroit Water and Sewerage Department (DWSD), the United States, the State of Michigan, and all communities in south-eastern Michigan¹ to which DWSD provides water and from which waste-water is removed: a federal statute, the Clean Water Act of 1972, and Article 7 of the Michigan Constitution, adopted in 1961.

The Clean Water Act requires sweeping changes in the ways wastewater is collected and treated, which dramatically affects the quality of water. It also requires that complex permits be obtained from the federal Environmental Protection Agency (the EPA) controlling the ways in which the goals of the statute would be met. In 1977, when the EPA began its enforcement action against the State of Michigan, the City of Detroit, and DWSD, I became aware of my need to determine how the Clean Water Act impacted the state Constitution's provisions regarding cities in both owning and operating water and sewer treatment systems. Those two laws remain essentially the same today, as do the conflicts between the parties, and I keep this overlying framework in mind when analyzing these disputes.

I note that all those who have made submissions to this Court implicitly recognize my power to entrust to anyone of my choosing the office of Special Administrator. As discussed below, a review of the facts indicates that under Mayor Kilpatrick's Special Administratorship,

¹The case was assigned to my docket and I added all communities under contract with DWSD for sewerage services.

DWSD's compliance has improved dramatically, such that the position of Special Administrator (which is akin to a receiver) is not necessary at this time. Therefore, because I am ending the position of Special Administrator for the present time, I DENY the motion to replace Mayor Kilpatrick as Special Administrator for mootness. As for the remaining requested relief, I DENY the motion because the requests for relief are not ripe.

FINDINGS OF FACT

I. History of the Consent Judgments and Special Administratorship

In 1977, the parties to this case entered into a Consent Judgment, but less than a year later, it became clear that compliance would not be achieved easily or quickly. In 1979, I created the position of Special Administrator, because I found that compliance with the Consent Judgment the parties had negotiated, required the exercise of this court's equitable powers. (Opinion of March 21, 1979, Case No. 77-71100, slip op. at 8.)

On March 21, 1979, I selected the Mayor of Detroit to be Special Administrator, stating as my reason for selecting him is that when exercising the federal government's power under the U.S. Constitution to override a State's or City's choices regarding its governance, the doctrine of the separation of powers meant that "great care must be taken to reach a balance that does not summarily deny to such local government the full exercise of its authority over its affairs." (Opinion of March 21, 1979, Case No. 77-71100, slip op. at 8.)

Shortly thereafter, the first amendment to the Consent Judgment was signed, and DWSD operated under it for several years. During those years, I sometimes temporarily suspended the Special Administratorship. When compliance with the Clean Water Act or the Consent Judgments in this case was at risk, however, I have revived the Special Administratorship and again given the Mayor of Detroit the power to swiftly take the necessary actions to achieve

compliance. No party has ever objected to my decision to create or suspend the post based on the record of compliance, nor does the current motion challenge that rationale.

II. Facts Regarding Municipal Government Structure and the Michigan Constitution

The City of Detroit owns the water and sewer system which it operates through DWSD, and thus provides water and sewerage services to its inhabitants. DWSD sells and delivers water and provides sewage disposal services outside of its corporate limits to a large number of willing buyers now numbering nearly four million inhabitants outside the City of Detroit..

The State of Michigan's Constitution, Article 7, §24 reads: "Subject to this constitution, any city or village may acquire, own or operate, within or without its corporate limits, public service facility for supplying [...] water [and] sewage disposal [...] to the municipality and the inhabitants thereof." It continues: "Any city [...] may sell and deliver water and provide sewage disposal services outside of its corporate limits in such amount as may be determined by the legislative body of the city or village[.]" *Id.* (emphasis mine.) The State of Michigan's Constitution, Article 7, §34 reads: "provisions of this constitution and law concerning [...] cities [...] shall be liberally construed in their favor."

III. History of the Kilpatrick Special Administratorship

In 1998, the State of Michigan, in tandem with the EPA, issued a notice of violations of DWSD's permit to operate the sewage plant (permit no MI 0022802). (See Order of Feb 7, 2000, case no. 77-71100, slip op. at 2.) At that time, I appointed a committee to investigate why, after so many years of court oversight, the plant was not able to remain in compliance with federal law and state law. *Id.* In January of 2000, the committee issued a report, which found that many causes of that non-compliance existed for at least three years. *Id.* Some short term, unsustainable measures were taken to bring the plant into technical compliance, but it was clear

to me that once again, a Special Administrator, vested with the equitable powers of the federal court, would be necessary to bring DWSD into long term compliance. *Id.* at 3.

When Mayor Kilpatrick came into office, I named him Special Administrator. In two key actions, Mayor Kilpatrick, acting as Special Administrator, ordered both the hiring of Victor Mercado as DWSD's director, and the Infrastructure Management Group, a national corporation based in Maryland, as consultant to DWSD.

IV. Key Performance Measures During Kilpatrick's Special Administratorship

A. Performance of Director of DWSD

The Wastewater Treatment Plant has not violated its National Pollution Discharge Elimination System (NPDES) permit during Mercado's tenure. I attach hereto and make a part hereof a letter from Phil Argiroff, P.E., Supervisor of Public Wastewater & Drinking Water Unit, Water Bureau, Southeast Michigan District Office, as an Appendix to this Opinion. It speaks for itself. Construction work and other projects required to comply with federal and state law has proceeded largely on schedule. Update to DWSD's Plan for Long-Term Measures to Ensure Compliance with Permit Requirements, Nov. 1, 2005. When difficulties have arisen, Mercado has promptly alerted this Court to any potential problems and reported on his efforts to solve those problems in regular oversight meetings. The formal reports required by the Consent Judgment's have also been completed in a timely fashion. *Id.*

Mercado has cut DWSD's operating budget by approximately 10 percent without having a negative impact on compliance. Consequently, the increases in water rates during Mercado's tenure have been relatively small, especially in comparison to previous years. DWSD's water and sewerage rates are among the lowest in the nation despite the cost of many required improvements. The reduction in rate increases also has not impeded DWSD's current

compliance with federal and state law. Moreover, the reduction in rate increases has not impeded DWSD's ability to comply with federal and state law in the future, in that DWSD's bond ratings have remained good.

Mercado has proven himself capable of executing the necessary projects to comply with federal and state law while keeping costs low. The ability to keep costs low without jeopardizing DWSD's services is key to the long-term success of DWSD's compliance, because DWSD's difficulties in maintaining compliance with federal and state law has been exacerbated by the continuing controversies over rate increases resulting from heavy infrastructure requirements.

Mayor Kilpatrick has used his Special Administratorship to extend Mercado's contract through the end of 2006.

B. Infrastructure Management Group's Performance

Significantly, the Infrastructure Management Group (IMG) has assisted Mercado and this Court by providing evaluations of DWSD's contracts and noting opportunities for increased efficiency. Increased efficiency is key to the long-term success of DWSD's compliance, because it helps to ensure that the Consent Judgment's requirements are carried out speedily and at the lowest possible cost. IMG's recommendations have provided vital assistance to this Court in its oversight of compliance activities. For instance, its aid in preparing new template language for "model" contracts is a key step forward toward long-term compliance.

C. Progress Summary

Thus two key decisions by Mayor Kilpatrick, acting as Special Administrator, the hiring of Mercado and IMG have resulted in significant progress toward compliance with the Clean Water Act. There have been no permit violations, there has been good progress on the

construction of mandatory projects, and financially DWSD is in a position to continue compliance. Under Kilpatrick's leadership, DWSD is now making steady progress toward long-term compliance and the end of this Court's oversight.

V. Disputed Contracts

The motion also asks for relief regarding several contracts approved by Mayor Kilpatrick as Special Administrator, focusing most strongly on a contract for a regional communications system. All the contracts mentioned were the subject of press reports, which the motion cites. At the time the first press reports regarding these contracts were published, as part of my oversight, I asked this Court's Special Master, F. Thomas Lewand, to investigate each contract and make a report and recommendation to this Court. This investigation is nearly completed.

VI. The Consortium

The decision of the Rouge River communities in Southeast Michigan to create a forum that successfully handled disputes regarding water quality infrastructure and rates outside of the litigation process marked a turning point in their compliance. Because of its effect, namely, a new commitment to long-term, stable compliance with pollution laws, it paved the way for ending court oversight. United States, et al., v. Wayne County, et al., Order Approving Joint Motion to Terminate the Consent Decree, slip op. at 3 (E.D. Mich. Nov. 28, 2005).

Additionally, in 2001, I invited 40 civic and governmental leaders of Southeast Michigan to become a consortium to address water quality problems. See Order Defining the Role of the Southeast Michigan Consortium (case no. 77-71100), 261 F. Supp. 2d 906, 910 (E.D. Mich. 2003). Participation in the Consortium or in any solution it recommends is entirely voluntary. See United States, et al. v. Wayne County, et al., 280 F. Supp. 2d 726, 728 (E.D. Mich. 2003). Leaders in the business community, the nonprofit community, and from local governments have

donated their time to the Consortium, and worked toward resolving disputes and made recommendations for measures that help achieve long-term compliance with the law. This Court is grateful for their extensive service and encouraged by the progress reported at meetings.

CONCLUSIONS OF LAW

I. Justiciability: Mootness and Ripeness

Even if no party raises issues of justiciability, this Court has a responsibility to examine whether the parties before it are raising a justiciable claim. North Carolina v. Rice, 404 U.S. 244, 245 (1971); Metropolitan Washington Airport Auth. v. Citizens for Abatement of Airport Noise, 501 U.S. 252, 265 n.13 (1991). To avoid dismissal for mootness, an "actual controversy" must be present, and a court must be able to provide a remedy. Preiser v. Newkirk, 422 U.S. 395, 401 (1975) (quoting Steffel v. Thompson, 415 U.S. 452, 459, n. 10 (1974)); Church of Scientology of CA v. United States, 506 U.S. 9, 12 (1992).

Courts must dismiss a case for lack of ripeness unless the Complaint regards an existing and substantial controversy, and not a hypothetical question or possibility of harm. Dixie Fuel Co. v. Comm'r of Social Security, 171 F.3d 1052, 1057 (6th Cir. 1999) (quoting City Communications Inc. v. City of Detroit, 888 F.2d 1081, 1089 (6th Cir. 1989)). In determining whether a claim is ripe, the Sixth Circuit has considered the following factors: "(1) the likelihood that the harm alleged will ever come to pass; (2) whether the factual record is sufficiently developed to allow for adjudication; and, (3) hardship to the parties if judicial review is denied." Norton v. Ashcroft, 298 F.3d 547, 554 (6th Cir. 2002) (citing Adult Video Ass'n v. US, 71 F.3d 563, 568 (6th Cir. 1995)). See also National Park Hospitality Assoc. v. Dept. of the Interior, 123 S.Ct. 2026, 2030 (2003); Abbott Laboratories v. Gardner, 387 U.S. 136, 149 (1967) (rev'd on other grounds, Califano v. Sanders, 430 U.S. 99, 105 (1977)).

II. Special Administrator

As a federal judge, I have a power denied to the Michigan legislature and other officers of Michigan's government: the power to override the Michigan Constitution and other state law. The Supremacy Clause of the U.S. Constitution allows me to do this when it is necessary to enforce federal law, which includes the Consent Judgment and its amendments. United States Const. art. VI, ¶ 2. The appointment of a special administrator with the ability to exercise those powers is appropriate when it is "a valid and reasonable means to ensure the dual goals of prompt, meaningful, and full compliance" with the current Consent Judgment and the goal of "extrication of the federal judiciary from the management of state governmental functions." Glover v. Johnson, 934 F.2d 703, 725 (6th Cir. 1991). The Sixth Circuit also teaches the need to ensure that there is "no less intrusive means of bringing about compliance" when appointing a special administrator. Id. at 714.

I have been concerned about the potential intrusiveness of creating a special administrator for DWSD, and thus, when exercising that equitable power, I have respected the principles of our federal system that emphasize the integrity retained by each State, and thus local, government and the respect owed to it by federal authorities. See, e.g., Hess v. Port Auth. Trans-Hudson Corp., 513 U.S. 30, 41 (1994); Puerto Rico Aqueduct and Sewer Authority v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993); City of Trenton v. New Jersey, 262 U.S. 182, 186 (1923) (municipalities are subdivisions of state; "within the limits prescribed by the state Constitution," power to own and operate waterworks is frequently conferred by states on municipalities). That doctrine requires me to give weight to the decision of the people of Michigan, expressed in the Michigan Constitution, about the structure and ownership of their government and the place of home rule within it.

The plain language of the Michigan Constitution vests the power to operate the Detroit Water and Sewerage Department, both within and outside City limits, with the City of Detroit. Mich. Const. Article VII, § 24. Even if there were any doubt about how to interpret Article 7, § 24, the Michigan Constitution instructs courts to construe that provision liberally in favor of the City of Detroit. Article 7, §34.²

In an attempt to balance the need for DWSD to comply with federal law and with the Michigan Constitution's clear statement that ownership and control of the system belongs with the City of Detroit, I chose to create the position of Special Administrator and place the Mayor of Detroit in that role. United States v. City of Detroit, et al., Case No. 77-71100, slip op. at 8 (E.D.Mich. March 21, 1979). The appointment of a Special Administrator is for the express power of allowing him to override the City's charter when necessary to effectuate speedy compliance.³

Any decision to allow suburban leaders a measure of control over the Detroit Water and Sewerage Department requires me to use federal power to permit what state law forbids. See U.S. Const. art VI 2. Such an exercise of power would show little respect for the choices of the people of Michigan, and would only be appropriate when the need for a Special Administrator is

² Read together, these provisions give definitive control of DWSD's operations to the City of Detroit. Even if the lack of court decisions interpreting this provision rendered this an unsettled question (which I do not believe it does given the plain language), and I had to predict how the state's highest court would rule, I can find no legal basis whatsoever for reading these provisions to do anything other than give exclusive control of DWSD operations to Detroit. Mills v. GAF Corp., 20 F.3d 678, 681 (6th Cir. 1994) (when state law is unsettled, a federal court must predict what the state's Supreme Court would rule).

³ Maconb asserts that the Special Administrator's power is limited by the terms of the Detroit City Charter, and in support of this position, cites the City Charter. (Br. in Supp. 20. ("Therefore, the powers of the Mayor, including those actions taken in his role as Special Administrator, are limited by the terms of the Detroit City Charter.")) This assertion is in error. A federal court does not rely on state law for its powers; on the contrary, the United States Constitution allows the federal government to override state law when necessary to effectuate compliance with federal law. E.g., BFP v. Resolution Trust Corp., 511 U.S. 531, 546 (1994). Thus, the legality of actions taken by this Court's Special Administrator depends solely on congruence with federal, not state or municipal, law.

acute and the probable outcome of such an appointment significantly speeds compliance with federal and state water and anti-pollution laws.

Here the facts show a rapid improvement in the operation of DWSD such that the Department is successfully completing or attempting to complete its responsibilities under the Consent Judgments, and, although more work remains, is well on its way to achieving compliance with the Clean Water Act. I find that compliance with federal law no longer regularly requires urgent action. Therefore, I TERMINATE the Special Administratorship, because it is not needed at the present time. As the termination of the Special Administratorship renders the controversy over who this Court selects to fill that role moot, I DENY the motion.

I note that nothing in this Opinion and Order prevents the Mayor of Detroit from requesting that this Court again exercise its own equitable powers, should an urgent situation arise that requires the override of the Cities' charter to effectuate compliance with the Consent Judgment.

II. Disputed Contracts

Much of the requested relief in the motion deals with contracts that this Court's Special Master is in the process of investigating. The City of Warren and Macomb County have emphasized the need for an evaluator independent of the City to examine those contracts. (City of Warren's Resp., 4; Macomb County Br. in Resp., 2.)

The Special Master is independent of the City, and is in the process of researching and preparing a report for the Court on the contracts at issue. The wide-ranging and at times unspecific briefs indicate that all parties and this Court would benefit from having a clear report and recommendation from the Special Master regarding these contracts. Any specific points that

might remain could then be brought at that time in the normal procedure, i.e., in the form of objections to the Special Master's Report and Recommendation.

In other words, consideration of these issues would greatly benefit from the additional factual development by the Special Master that is underway. The look-back procedure can be used to address any overcharging of the rates, and therefore, there is little hardship to the parties of delaying action until the Special Master can make his reports and recommendations and this Court can act on them. Therefore, because further factual development is needed and the look-back procedure can remedy any hardship, I find the remaining issues in the motion are insufficiently ripe, and DISMISS those claims for lack of justiciability.

III. Southeast Michigan Consortium for Water Quality

DWSD's long-term compliance with federal law would be better assured if the water quality leaders of this region could develop a process for working out difficulties between DWSD and its customers outside of the litigation process. Although the State Constitution places the right to own and operate the system solely in the hands of the City, the City voluntarily agreed to participate in the Consortium, as did a wide variety of other leaders, including those who represent DWSD's largest customers. I have encouraged this venue for customer participation in hopes that this forum would accustom all the region's leaders to working together to achieve compliance with pollution laws.

None of the dozens of parties nor the amicus assert a lack of progress by the Consortium, other than the movant. My own observations convince me that the Consortium has made progress on key issues. That noted, I will not continue to ask talented leaders in our region to devote their energies to the Consortium unless there is optimism that this is a venue in which further progress can be made. To that end, I request that Timothy O'Brien, the Consortium's

working chairman, and either Charles Hersey or Paul Tait, SEMCOG's officers, who have provided key staff support to the Consortium, report to me on their views of the progress that has been made thus far and what issues remain to be addressed.

CONCLUSION

DWSD's record of compliance has improved markedly in the last few years. This means that no Special Administratorship is necessary at the present time. Because no Special Administratorship is presently in existence, the motion to replace the Special Administrator is therefore moot and must be DENIED. The portions of the motion regarding various contracts are not ripe, and must be DENIED. **IT IS SO ORDERED.**

Finally, I look at the long running series of disputes between the City and its customers in their broad historical and legal context. The City of Detroit facilitated the growth of this region when it expanded its sewer and water systems far beyond the bounds of the City at the same time that the Eisenhower administration in the 1950's began building our interstate highways in Michigan.

Now, a half century later, Detroit through the Detroit Water and Sewerage System has built a substantial regional complex which each day and night provides high-quality water to and removes waste water from the homes and industries of over four and one-half million people.

Now, DWSD's system, vital as it is to the health and quality of life in southeastern Michigan, has faced repeated challenges from some suburban communities who are prevented by the state's constitution from having any say in the ownership or operation of DWSD. At the same time, the people of Detroit who provide this valuable service are barred by state law from receiving any financial benefit or profit for doing so. This tension underlies the disputes that continue to come before this court.

This dilemma will not be resolved by legislation or litigation. It demands cooperation on the part of the southeast Michigan communities and the agreement by DWSD to modify the protection given to it by the state's Constitution as a part of a regional settlement.

John Feikens
John Feikens
United States District Judge

Date:

January 5, 2006



JENNIFER M. GRANHOLM
GOVERNOR

STATE OF MICHIGAN
DEPARTMENT OF ENVIRONMENTAL QUALITY
SOUTHEAST MICHIGAN DISTRICT OFFICE



STEVEN E. CHESTER
DIRECTOR

December 22, 2005

Honorable John Feikens
United States District Court
Eastern District of Michigan
851 Federal Building
Detroit, Michigan 48226

Dear Judge Feikens:

Last year, we offered a brief statement about the construction projects at the Detroit Wastewater Treatment Plant (WWTP) established as essential projects under Section II.D.6 of the Second Amended Consent Judgment (SACJ). The purpose of this letter is to offer an updated statement through 2005. The SACJ required that the Detroit Water & Sewerage Department (DWSD) submit a comprehensive plan for long-term measures to ensure compliance with NPDES permit requirements (Section II.D.3). DWSD's comprehensive plan included the WWTP Program Management contract (PC-744). Under this contract, DWSD conducted detailed needs assessments of the WWTP's primary treatment, secondary treatment, and solids handling facilities, followed by development of needed WWTP improvement projects.

The WWTP Program Management contract resulted in 42 project definition statements. Of these, our office determined that 13 projects were "essential projects" needed to assure compliance at the WWTP. In addition, two projects were combined to form one new project. We have continued to meet routinely with Ms. Louise Lieberman, DWSD, and PC-744 Program Management staff during 2005 to discuss the status of these projects. At this time, construction has been completed for five projects, and the rest of the projects are under construction and on schedule. A detailed list of these essential projects is included as Appendix B2 to DWSD Comprehensive Plan Update, dated October 27, 2005.

In our opinion, the "essential projects" that have been completed or will be completed by the middle of 2006, should significantly help the WWTP ensure long-term compliance with NPDES requirements. We believe that the Court's inclusion of these requirements in the SACJ was most insightful and helpful, and that DWSD's implementation of the WWTP Program Management contract (PC-744) continues to be very effective.



Honorable John Feikens
December 22, 2005
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If you have any questions, please contact me at 586-753-3760.

Sincerely,



Phil Argiroff, P.E., Supervisor
Public Wastewater & Drinking Water Unit
Water Bureau
Southeast Michigan District Office

cc: Dr. Jonathan Bulkley, Federal Court Monitor
Mr. Gary Fujita, DWSD
Ms. Louise Lieberman, DWSD
Ms. Pam Stevenson, DAG
Mr. Pete Ostlund, DEQ-WB
Ms. Laura Verona, DEQ-WB
Ms. Jodi Peace, DEQ-WB
Ms. Jodie Taylor, DEQ-WB